

Rule 508. Environmental self-evaluation privilege.

(a) Definitions. As used in this rule:

(1) "Administrative proceeding" means an adjudicatory proceeding conducted by the department or other government entity with authority to enforce any environmental law, including any notice of violation proceeding, any department proceeding listed in Section 19-1-305, or any proceeding conducted pursuant to Title 63, Chapter 46b, Utah Code Ann. (1953) Administrative Procedures Act.

(2) "Department" means the Department of Environmental Quality.

(3) "Environmental audit report" means any document, information, report, finding, communication, note drawing, graph, chart, photograph, survey, suggestion, or opinion, whether in preliminary, draft, or final form, prepared as the result of or in response to an environmental self-evaluation.

(4) "Environmental law" means any requirement contained in Title 19 Utah Code Ann. (1953), or in rules made under Title 19 Utah Code Ann. (1953), or in any rules, orders, permits, licenses, or closure plans issued or approved by the department, or in any other provision or ordinance addressing protection of the environment.

(5) "Environmental self-evaluation" means a self-initiated assessment, audit, or review, not otherwise expressly required by an environmental law, that is performed to determine whether a person is in compliance with environmental laws. A person may perform an environmental self-evaluation through the use of employees or the use of outside consultants.

(6) "In camera review" means a confidential review in which only the court has access to the privileged information.

(7) "Judicial proceeding" means a civil proceeding.

(b) General rule of privilege. A person for whom an environmental self-evaluation is conducted or for whom an environmental audit report is prepared can refuse to disclose and prevent any other person from disclosing an environmental audit report. However, the existence of an environmental audit report, but not its content, is subject to discovery but is not admissible as evidence in an administrative or judicial proceeding. Use of an environmental audit report in a criminal proceeding does not waive or eliminate the privilege in an administrative or civil proceeding.

(c) Who may claim the privilege. The privilege may be claimed by the person for whom an environmental self-evaluation is conducted or for whom an environmental audit report is prepared. The privilege may also be claimed by such person's guardian, conservator, personal representative, trustee, or successor in interest. Regardless of who prepared the environmental audit report, only the person for whom the environmental audit report was prepared can waive the

environmental self-evaluation privilege under this rule. If the person is a corporation, company, or other business entity, the power to waive the privilege is limited to the officers and directors who have the requisite management authority to act for the entity.

(d) Exceptions. No privilege exists under this rule:

(1) Waiver. If the person for whom the audit report was prepared expressly waives the privilege;

(2) Fraud. If the privilege is being asserted for a fraudulent purpose;

(3) Avoidance. If the environmental audit report was prepared to avoid disclosure of information in a compliance investigation or proceeding that was already underway and known to the person asserting the privilege;

(4) Danger to public health or environment. If the information contained in the environmental audit report must be disclosed to avoid a clear and impending danger to public health or the environment outside of the facility property;

(5) Failure to address noncompliance. If the environmental audit report conclusively shows that the person for whom the environmental audit report was prepared is not or was not in compliance with an environmental law and after the environmental audit report the person did not initiate appropriate efforts to achieve compliance with the environmental law within a reasonable amount of time. If an environmental audit report shows noncompliance with more than one environmental law, or if the noncompliance will require substantial resources to achieve compliance, the person may demonstrate that appropriate efforts to achieve compliance were or are being taken by instituting a comprehensive program that establishes a phased schedule of actions to be taken to bring the person into compliance within a reasonable amount of time;

(6) Required by law. If the document or information is specifically required to be available or furnished to a regulatory agency by any environmental law or any other law or rule;

(7) Obtained by department. If the information is obtained by the department through observation, sampling, or monitoring;

(8) Independent source. If the information is obtained through any source independent of the voluntary environmental self-evaluation.

(e) In camera review.

(1) The person seeking disclosure of an environmental audit report shall request an in camera review of the audit report by a court of record.

(2) During in camera review, the party seeking disclosure of the environmental audit report may not have access to the environmental audit report.

(3) (A) If the court of record determines that part of an environmental audit report is not privileged, the court shall order the disclosure of the nonprivileged portions of the environmental audit report.

(B) The privileged portions of the environmental audit report may not be disclosed.

(f) Burden of proof. The person asserting the environmental self-evaluation privilege has the burden of establishing a prima facie case of privilege. The person seeking disclosure of an environmental audit report has the burden of proving that the environmental audit report is not privileged.

(g) Other privileges not affected. Nothing in this rule:

(1) limits, waives, or abrogates the scope or nature of any other statutory or common law privilege; or

(2) limits, waives, or abrogates the department's authority to obtain or use documents or information that the department is required to have under federal law to obtain delegation of a federal program.

(h) Scope of rule. This rule shall apply to all administrative and judicial proceedings commenced on or after March 21, 1995.

(Added by Laws 1995, S.J.R. 6, effective February 28, 1995. Amended by Laws 1997, S.J.R. 14, effective May 5, 1997.)